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December 9, 2002

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DEC - 9 2002

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
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Washington, DC 20002

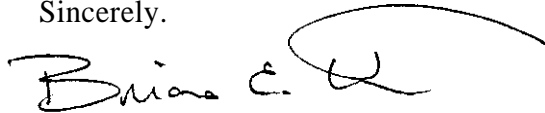
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CG Dkt. No 02-278
CC Dkt. No. 92-90

Dear Ms. Dortch:

On behalf of Cox Enterprises, Inc. ("CEI"), we hereby submit for filing CEI's comments in response to the FCC's Notice of Proposed Rulemaking regarding the rules and regulations implementing the Telephone Consumer Protection Act of 1991.

Sincerely,



Briana E. Thibeau

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List A B C D E

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

RECEIVED

DEC - 9 2002

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

CG Docket No. 92-90

COMMENTS OF COX ENTERPRISES, INC.

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COX ENTERPRISES, INC

December 9, 2002

SUMMARY

In this proceeding, the Federal Communications Commission seeks comment as to whether it should modify or add to its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”). Those rules govern the manner in which companies may engage in telemarketing to solicit sales from telephone subscribers and use facsimile machines to advertise their products and services. The TCPA also authorizes the Commission to create a nationwide “do-not-call” database, and to prohibit companies from telemarketing to residential telephone subscribers who choose to place their names and numbers in this database. Although in 1992 the Commission concluded that it would not serve the public interest to establish a national do-not-call list, it now asks whether it should revisit that conclusion in light of changes in telemarketing technology and a decade of experience enforcing its existing telemarketing rules.

Cox Enterprises, Inc. (“CEI” or “Cox”) respects the privacy interests of consumers and acknowledges that a national do-not-call registry may advance those interests. Accordingly, Cox would not oppose the adoption of such a registry provided that it incorporates a broad and flexible “established business relationship” exception that would permit all of Cox’s affiliates to maintain, renew and build upon their existing relationships with customers. The Commission should refrain from narrowing the scope of its existing exception to prohibit companies that have established relationships with customers based on one type of product or service from calling customers on the do-not-call list to advertise a different service or product. Such a limitation would be contrary to both the language and legislative history of the TCPA and would severely impede the deployment of new advanced broadband services by Cox’s affiliates to their existing customers.

Although a national do-not-call database may enhance consumer privacy interests, the adoption of two separate federal do-not-call lists, each administered by a different federal agency and accompanied by different rules and regulations, would be discordant and difficult to administer. Accordingly, if a federal do-not-call database is to be created, it should be implemented by the FCC which, unlike the Federal Trade Commission (“FTC”), possesses express statutory authority to establish such a system and has no jurisdictional limitations that would hamper its effectiveness. If the FTC nonetheless chooses to adopt its own do-not-call list under its limited authority, the FCC should adopt parallel rules and regulations to the extent necessary to subject telephone carriers and other companies that fall outside the FTC’s jurisdiction to the same telemarketing restrictions that would apply to all other businesses. Such action would be especially necessary to prevent harm to the market for high speed Internet and advanced video services where cable operators compete directly with telephone companies that are beyond the jurisdictional reach of the FTC’s telemarketing rules.

Apart from its consideration of a national-do-not call list, the Commission also proposes to reevaluate its rules prohibiting the transmission of unsolicited facsimile advertisements. Specifically, the Commission asks whether it should clarify the circumstances in which so-called fax broadcasters will be legally responsible for the unsolicited fax advertisements they send on behalf of their customers. In past Orders, the Commission *has* framed the duties of fax broadcasters by reference to principles of common carrier liability. Although there may be circumstances in which fax broadcasters function like common carriers, the Commission should recognize that common carriers and fax broadcasters generally provide fundamentally different services and function in very different ways that have important legal implications under the TCPA. The statute prohibits persons from “using” a fax machine to “send” an unsolicited

advertisement to a telephone facsimile machine. While fax broadcasters' conduct may fall within the scope of the TCPA because they "use" fax machines to "send" fax advertising messages, by contrast, coinion carriers plainly do not "use" fax machines to "send" advertisements on behalf of their subscribers. Instead, common carriers merely provide the network over which advertisers, or sometimes fax broadcasters, may transmit content of their choosing (including, perhaps, unsolicited advertisements). On this basis alone, the Commission should clarify that a coinion carrier's provision of access to a telecommunications service network simply cannot give rise to liability for unsolicited facsimile advertising.

In addition, the Commission has suggested that "actual knowledge" of a customer's illegal faxing activity, combined with "failure to take steps" to prevent such transmissions, could possibly subject a "coinion carrier" to liability under the TCPA. The Commission may have intended this standard to address the potential liability of fax broadcasters, not mere common carriers. But in any event, the extension of such liability to common carriers would be contrary to the plain language of the statute and the Supreme Court's holding that "aiding and abetting" and similar principles of secondary liability cannot be inferred from federal laws that do not expressly provide for such violations. Finally, even if the FCC adheres to its "actual knowledge" test for coinion carrier liability, it should clarify that this standard requires (as it does in the obscenity context), both actual notice of an adjudicated violation and a basis for knowing that the customer will commit future violations.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CG Docket No. 92-90
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COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. (“CEI” or “Cox”) hereby submits these comments in response to the Federal Communications Commission’s Notice of Proposed Rulemaking’ relating to its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”).²

BACKGROUND

Cox has a 104-year history of leadership in the media and communications industries and today is one of the nation’s largest diversified media companies. with significant operations **and** investments in cable television. telephony, high-speed Internet access, broadcast radio and television stations. newspapers. and local web content.

CEI’s subsidiary. Cox Communications, Inc. (“CCI” or “Cox Communications”), is one of the nation’s largest multi-service advanced communications companies. CCI and its affiliates offer an array of services to their customers. including cable television, advanced digital video

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking*, CG Docket No. 02-278, CC Docket No. 92-90, 67 Fed. Reg. 62667 (released Sept. 18, 2002) [hereinafter, the *Notice* or *NPRM*].

programming services, local and long distance telephone services, high speed Internet access, and commercial voice **and** data services. CCI is the fourth largest cable company in the nation and operates one of the highest-capacity and most reliable broadband delivery networks in the world.

CCI relies heavily on telephone contacts to acquire, maintain and strengthen relationships with its customers in order to offer new services and compete with other providers. More so than other marketing channels, telephone contacts enable Cox Communications' customer care representatives to fully explain the features and capabilities of CCI's diverse bundle of services and to tailor competitive service offerings and flexible billing options to the requirements of individual customers.

Another CEI subsidiary, Cox Newspapers, Inc. ("CNI"), is one of the nation's largest newspaper publishing enterprises with seventeen daily and thirty weekly newspapers in metropolitan areas such as Atlanta, Austin, Dayton, and Palm Beach. Telephone calls likewise play a critical role in CNI's efforts to alert readers to the content and availability of its publications and to distribute its newspapers. Telephone campaigns allow CNI's newspapers to offer consumers low-cost, convenient access to a vital information resource. At just one third of the cost of direct mail, outbound telephone campaigns are by far the most efficient and cost-effective method of acquiring subscribers for CNI papers. On average, CNI's major daily newspapers acquire over fifty percent of their new subscribers through such means. CNI's newspapers also use telephone contacts to renew subscriptions, renew classified advertising

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² Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

listings, and tailor frequency, delivery, payment and billing options to suit individual customer preferences and needs.

Another CEI affiliate, Cox Business Services ("CBS") provides single-network telephony, data, and high speed Internet services to businesses of all sizes. CBS recently was named as a co-defendant in three putative class action complaints filed against Fax.com, Inc. ("Fax.com"), its president, and various fax advertisers alleging that Fax.com's broadcast fax business violates the TCPA.³ CBS provides common carrier services to Fax.com and many other subscribers in California, and is neither affiliated with Fax.com nor involved in Fax.com's business. Nonetheless, the complaints allege that CBS is responsible for unsolicited fax advertisements allegedly sent over its common carrier network by Fax.com because CBS provides Fax.com with common carrier services allegedly with knowledge that this customer uses and needs these services for its broadcast fax business. The complaints seek, among other things, damages from CBS, a nascent competitive local exchange carrier, and the other defendants in excess of two trillion dollars. In essence, these claims seek to impose obligations on common carriers for the content of transmissions over their networks and would require common carriers to screen subscribers and second-guess their transmissions. This is fundamentally contrary to well-established principles of common carrier law and specific principles articulated by Congress and the Commission regarding the obligations of common carriers under the TCPA.

³ *Redefining Progress v. Fax.com, Inc.*, United States District Court, Northern District of California, Case No. C-02-4057 MJJ (2002); *David v. I/L/x.com, Inc.*, California Superior Court, continued...

DISCUSSION

I. THE COMMISSION'S NATIONAL DO-NOT-CALL SCHEME SHOULD RETAIN A BROAD, ESTABLISHED BUSINESS RELATIONSHIP EXCEPTION.

The TCPA authorizes the Commission to establish “a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.”⁴ The term “telephone solicitation,” as statutorily defined, “does not include a call or message . . . to any person with whom the caller has an established business relationship.” Therefore, in authorizing a national do-not-call database, Congress ensured that it could not be used to prevent telemarketing calls to persons with whom the caller has formed an “established business relationship.”⁶

The House Committee explained that this established business relationship exemption was designed to strike a balance between “barring all calls to those subscribers who object[] to unsolicited calls” and the legislature’s “desire to not unduly interfere with ongoing business relationships.”⁷ To provide as **much** protection as possible to the former interest, while respecting the latter, Congress “adopted an exception to the general rule – that objecting

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Alameda County. Case No. 20022063723 (2002); *David v. Fax.com, Inc.*, United States District Court, Northern District of California. Case No. C-02-4243 BZ (2002).

⁴ See 47 U.S.C. § 227(c)(3).

⁵ See *id.* at §227(a)(3).

⁶ *Id.*

⁷ See H.R. Rep. No. 102-317, at 13-16 (1991) [hereinafter, *House Report*].

subscribers should not be called – which enables businesses to continue established business relationships with customers”⁸

The Mouse Report emphasized that this established business relationship was intended to enable businesses to place calls that “build upon, follow up, or renew, within a reasonable period of time.” customer relationships.” The House Committee recognized that “consumers who previously have expressed interest in products or services offered by a telemarketer are unlikely to be surprised by calls from such companies or to consider them intrusive.”” The Committee also explained that the exemption Congress created for calls furthering “established business relationships” was *expressly designed to cover calls by cable television **systems** and newspapers to their existing subscribers:*

Under the exception adopted by the Committee, an established business relationship would include a business entity’s existing customers, for which an established business relationship is clearly present. Therefore, magazines, cable television franchises, and newspapers all could call their current subscribers to continue their subscriptions even if such subscribers objected to ‘unsolicited’ commercial calls. . . . In the Committee’s view, an established business relationship also could be based upon any prior transaction, negotiation or inquiry between the called party and the business entity.¹¹

In its original TCPA rulemaking, the Commission likewise “conclude[d], based upon the comments received and the legislative history, that a solicitation to someone with whom a prior

⁸ *Id.* at 13.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 14.

business relationship exists does not adversely affect subscriber privacy interests.”¹² The

Commission’s existing rules define an “established business relationship” as:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”

This definition is sufficiently flexible to encompass the various types of customer communications that Congress intended to protect, and enables cable systems, newspapers and other companies to renew customer relationships and communicate with existing customers regarding the full range of products and services that they offer

Nonetheless, in its *NPRM* the Commission asks whether it should narrow this definition for purposes of a national do-not-call list. Specifically, the Commission asks whether it should “consider modifying the definition of ‘established business relationship’ so that a company that has an established relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product.”¹⁴

Such a modification would be contrary to the statutory language which broadly exempts all calls to persons “with whom the caller has an established business relationship,” not merely those calls that relate to the same products or services that formed the original basis of the

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 91-90, Report and Order, 7 FCC Rcd 8752, 8770 (1992) [hereinafter, *First TCPA Order*].

¹³ 47 C.F.R. § 64.1200(f)(4).

¹⁴ *NPRM*, 67 Fed. Reg. at 62670.

relationship. Moreover, the legislative history indicates that Congress expressly intended the exception to permit, in appropriate circumstances, solicitations that offer new or different products or services to a caller's existing customers. The House Committee explained, for example, that pursuant to the established business relationship exception. "[a] person who recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information on related lines of merchandise, and a] loan officer or financial consultant may call a telephone subscriber who had requested a loan or bought auto insurance a couple of months ago to pitch new loan offerings or other types of insurance."

Therefore, if the Commission decides to modify the definition of the term "established business relationship," it should do so cautiously, respecting Congress' purposes for adopting such an exception. Any modification should be undertaken only for the purposes of preventing unfair surprise to the consumer, and the exception should not be defined so narrowly as to prevent consumers from learning about valuable new services and offers from companies they know and trust.

Limiting the ability of CCI and other broadband communications providers to communicate with existing customers about new products and services would be contrary to the Congressional purposes underlying the TCPA and would frustrate other important Congressional and Commission policies and goals. Specifically, such restrictions could retard the growth of broadband Internet services at a time when both Congress and the administration have placed a

¹⁵ *House Report*, H.R. Rep. No. 102-317, at 14-15.

high priority on speeding their deployment.¹⁶ Like most cable operators, CCI has expended enormous amounts of capital to upgrade its cable plant with fiber optics and digital technology. This massive infrastructure upgrade enables CCI to offer its existing cable customers a range of new advanced services, including digital video, video-on-demand, high speed Internet service and cable telephone service. Outbound telephone campaigns have proven critical to CCI's successful deployment of these powerful new broadband services. Such campaigns can pinpoint households in the path of rolling technological upgrades and are among the fastest and most efficient means of informing existing customers when new services become available in their neighborhoods.

Cox therefore urges the Commission to retain its broad and flexible definition of the term "established business relationship" so that the development of a national do-not-call database will not foreclose the possibility of building on existing customer relationships and prevent communications that are beneficial to both service providers and their customers. Preserving the scope of the current established business exception will not undermine the principle of consumer

¹⁶ See S. Rep. No. 104-230, at 50 (1995) ("deployment of advanced telecommunications services" is one of the "primary objectives" of the Telecommunications Act of 1996); Telecommunications Act of 1996, § 706. Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes to 47 U.S.C. § 157 (directing the FCC to conduct yearly review of deployment and make any regulatory changes necessary to ensure that high-speed Internet access, among other capabilities, is being deployed expeditiously); see *also* Remarks by Secretary of Commerce Donald L. Evans to the Precursor Group, February 6, 2002, *available at* <http://www.commerce.gov/opa/speeches/Evans-Precursor-Group.html> (last visited Nov. 12, 2002) ("We're working on ways to help accelerate broadband deployment and usage . . . NTIA will work closely with the FCC to craft the right regulatory policies to facilitate broadband deployment and the creation of a competitive broadband marketplace . . ."); Remarks of Commerce Assistant Secretary Nancy Victory, January 23, 2002, *available at*

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choice or the Commission's privacy objectives because consumers will continue to be able to prevent calls from those companies with whom they have chosen to do business simply by making a company specific do-not-call request. As the Commission has recognized, a "customer's request to be placed on a company's do-not-call list terminates the business relationship between the company and that customer for purposes of any future solicitation."

II. CABLE OPERATORS AND TELECOMMUNICATIONS SERVICE PROVIDERS WHO OFFER VIDEO PROGRAMMING, TELECOMMUNICATIONS, AND INTERNET SERVICES SHOULD BE SUBJECT TO THE SAME RESTRICTIONS ON TELEMARKETING.

As the Commission notes in the *NPRM*, the FTC has proposed to create a national do not-call list pursuant to its consumer protection jurisdiction. The creation of two independent national do-not-call regimes, each subject to different and possibly conflicting rules and enforcement mechanisms, is unlikely to serve the public interest. A bifurcated federal do-not-call scheme threatens to be unduly confusing to both consumers and businesses, and would only increase the complexity of a telemarketing landscape that is fragmented by more than two dozen disparate state do-not-call laws.

To the extent that a national do-not-call list promotes a federal policy interest, there should be a single, unified list and a single set of accompanying rules and procedures. Moreover, as between the two agencies, the FCC is in a far better position than the FTC to promulgate a national do-not-call registry. The TCPA expressly authorizes the Commission to

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http://www.ntia.doc.gov/ntiahome/speeches/2002/outlook_012302.htm (last visited Nov. 12, 2002) ("broadband issues are a top priority for President Bush and his administration").

¹⁷ *First TCPA Order*, 7 FCC Red at 8770 n.63.

“require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.”¹⁸

By contrast, the FTC has no parallel authority under the Telemarketing Consumer Fraud and Abuse Prevention Act,¹⁹ and any do-not-call system the FTC might create would be vulnerable to an appellate challenge.

Moreover, the FTC has acknowledged that many entities, including banks, credit unions, savings and loan companies, common carriers and insurance companies, would not be covered by its proposed national do-not-call rules because they are specifically exempt from coverage under the FTC Act.²⁰ Accordingly, companies in many industries that engage heavily in telemarketing would not be subject to the FTC’s national do-not-call requirements and could continue to call consumers even after they had placed their names and numbers on the FTC’s national list. This would invite consumer confusion and also create unfair hardships for entities that compete directly with firms exempted from the FTC’s telemarketing jurisdiction. The FTC’s jurisdiction does not extend, for example, to telephone common carriers that *compete* directly with CCI and other cable operators for the provision of Internet access and video services to consumers.²¹ It would be inconsistent with the public policy goal of rapid deployment of high speed data services to permit telephone companies to market DSL, high-speed Internet service to prospective customers whose numbers appear on a national do-not-call

¹⁸ 47 U.S.C. § 227(c)(3).

¹⁹ 15 U.S.C. §§ 6101-6108.

²⁰ See 67 Fed. Reg. 4492, 4493 (proposed January 30, 2002) (to be codified at 16 C.F.R. pt. 310) [hereinafter, *FTC Notice*]; see also 15 U.S.C. § 45(a)(2).

list while prohibiting cable operators from using the phone to market cable modem service to those same consumers. It also is doubtful whether a federal do-not-call scheme so pierced with exemptions could be said to “directly and materially advance” any consumer privacy interest and thereby withstand scrutiny under contemporary commercial speech doctrine.** Therefore, the Commission’s decisions in this rulemaking should be coordinated closely with the FTC’s pending telemarketing proceeding, and if any federal do-not-call system is to be adopted, it should be created as a single, comprehensive list by the FCC pursuant to its authority under the TCPA.

If the ITC nevertheless decides to adopt its own, incomplete national do-not-call list, the FCC should consider creating complementary do-not-call rules to the limited extent necessary to ensure uniformity across all industries engaged in telemarketing. Such action would be necessary to protect competition in video and high speed Internet services and in other industries that would be affected by the FTC’s limited jurisdiction. There is no justification for selectively imposing restrictions on cable operators in connection with a national do-not-call list that would not apply with equal force and effect to common carriers who offer services in competition with cable operators. Thus, to the extent permitted by the TCPA,²³ any national-do-not call rules

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²¹ See 15 U.S.C. § 45(a)(2)

²² See, e.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 181 (1999) (holding that “[t]he operation of the [casino gambling statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it”).

²³ Because the TCPA requires the FCC to create an “established business relationship” exemption in connection with any national do-not-call restrictions, the FCC should advise the FTC of the desirability of including such an exemption in any national do-not-call restrictions the FTC may develop. The failure by the FTC to include such an exemption in any FTC rules would

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adopted by the FTC (which would apply to cable operators but *not* to common carriers) should be extended by the FCC to common carriers and other companies outside the reach of the FTC Act.

111. THE COMMISSION SHOULD CLARIFY THAT COMMON CARRIERS ARE NOT LIABLE FOR THEIR SUBSCRIBERS' TRANSMISSIONS OF UNSOLICITED FAX ADVERTISEMENTS OVER THEIR NETWORKS.

In its *First TCPA Order*, the Commission stated that “[i]n the absence of a ‘high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions’ common carriers will not be held liable for the transmission of a prohibited facsimile message.”²⁴ In its *1995 TCPA Reconsideration Order*, the Commission clarified this standard as it applied to a “fax broadcaster, whether or not a common carrier,” emphasizing that fax broadcasters generally are not liable under the TCPA: “We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule.”²⁵ In its *Notice of Apparent Liability to Fax.com*, the Commission confirmed its prior rulings that “the prohibition on sending unsolicited fax advertisements does

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impose an unfair competitive disadvantage on companies like cable operators that compete with common carriers or other entities outside the jurisdiction of the FTC. This competitive disparity would remain even if the FCC adopted rules otherwise extending FTC national do-not-call restrictions to common carriers.

²⁴ *First TCPA Order*, 7 FCC Rcd at 8780, *quoting*, *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819, 2820 (1987) [hereinafter, *Obscenity Order*].

not apply to fax broadcasters that operate like common carriers by merely transmitting their customers' messages without determining either content or destination."²⁶

In the *NPRM*, the Commission asks whether it should "specify by rule the particular activities that would demonstrate a fax broadcaster's "high degree of involvement" in the unlawful activity of sending unsolicited advertisements to telephone facsimile machines."²⁷ Regardless of whether the Commission clarifies the obligations of fax broadcasters, it is critical that it distinguish those obligations from the duties of traditional common carriers that cannot and should not be held liable for third parties' transmissions of unsolicited advertisements over their networks

Common carriers and fax broadcasters generally offer fundamentally different services that have very different legal implications under the TCPA. To violate the TCPA, a person must "use any telephone facsimile machine . . . to send an unsolicited advertisement to a telephone facsimile machine."²⁸ By definition, "fax broadcasters" are persons who "use" fax machines to "send" fax advertising messages on behalf of their clients. Therefore, while a fax broadcaster's conduct – using telephone facsimile machines to send fax advertisements – may well fall within

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²⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, ¶ 35 (1995) [hereinafter, *1995 TCPA Reconsideration Order*].

²⁶ *In the Matter of Fax.com, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC File No. EB-02-TC-120, at 9, ¶ 13 (Aug. 7, 2002) (citations omitted) [hereinafter, *Fax.com NAL*].

²⁷ *NPRM*, 67 Fed. Reg. at 62675.

²⁸ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

the scope of the statute, common carriers' conduct plainly does not. Common carriers do not "use" fax machines to "send" advertisements on behalf of their subscribers. They merely provide the network over which any subscriber (including advertisers, or even "fax broadcasters"), may "use" a fax machine to "send" an unsolicited advertisement. Accordingly, common carriers' conduct falls outside the proscription of Section 227(b)(1)(C). This conclusion is fully consistent with the legislative history of the TCPA indicating that Congress did not intend for common carriers to be liable for facsimiles that others send over their networks:

[R]egulations concerning the use of [facsimile] machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message.”

Notwithstanding this direction that common carriers should not be liable unless they either originate an illegal transmission or control its content, the Commission has suggested that a carrier may be liable for transmissions over its network if the carrier had a "high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions."³⁰ This comment appears to have been directed at fax broadcasters who were claiming to be acting like common carriers, and the Commission should clarify that this standard applies to such fax broadcasters, and not to common carriers.

In any event, application of this standard to traditional common carrier activity would be contrary to the plain language of the TCPA and the Supreme Court's ruling that "aiding and

²⁹ S. Rep. No. 178 102d Cong., 1st Sess. 9 (1991).

³⁰ *First TCPA Order*, 7 FCC Rcd at 8780.

abetting” liability cannot be inferred from federal statutes that do not expressly provide for such a violation.” As the Supreme Court explained, “[t]he ascertainment of congressional intent with respect to the scope of liability created by a particular section [of a federal statute] must rest primarily on the language of that section.”³¹ Section 227 prohibits only the use of a telephone facsimile machine to send an unsolicited facsimile advertisement, and does not reach those who provide an instrumentality used by a sender to make an unlawful transmission. Accordingly, unless a carrier’s involvement rises to the level of actually “using” a fax machine to “send an unlawful advertisement, no liability can attach to the common carrier.”³²

When formulating its regulations and standards of liability for common carriers under the TCPA, the Commission looked to the obscenity context and Section 223 of the Communications Act for guidance.”³³ Unlike Section 227, however, Section 223 *expressly prohibits* common carriers from knowingly permitting the telecommunications facilities under their control to be used for purposes of transmitting unlawful communications.³⁴ Section 223 demonstrates that Congress knew how to impose secondary liability (and a duty) on carriers regarding their

³¹ See *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994).

³² *Id.* at 175, quoting, *Pinter v. Dahl*, 486 U.S. 622, 653 (1988)).

³³ Likewise, a carrier cannot be held secondarily liable for failing to stop a customer from using a telecommunications facility, even after notice of illegal use, because such conduct does not fall within the proscription of the statutory text.

³⁴ *First TCPA Order*, 7 FCC Rcd at 8779-80.

³⁵ See, e.g., 47 U.S.C. § 223 (a)(2) (“Whoever . . . knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined . . .”). Section 223 also includes a “safe harbor” provision that insulates carriers from liability for decisions to terminate access to a customer based on a good faith, but ultimately erroneous, belief that the customer was using the carrier’s facilities to transmit obscene communications. 47 U.S.C. § 223(c)(2)(A).

custoiners' transmissions. and Congress' decision not to include similar language in Section 227 demonstrates that it had no intent to hold carriers secondarily liable for failing to prevent their customers from sending unlawful fax advertisements over their networks.”

Accordingly, the Commission should clarify that while a fax broadcaster may be held liable if it had a “high degree of involvement” in illegal fax advertising transmissions or had “actual notice of an illegal use and fail[ed] to take steps to prevent such transmissions,” this standard of liability does not apply to coinion carriers.

If the Coinmission nonetheless adopts some form of a “high degree of involvement/ actual knowledge” standard for common carrier liability, it should specify what acts by a carrier could constitute a “high dgree of involvement” sufficient to trigger liability under the TCPA. The Commission already has acknowledged “the prohibition on sending unsolicited fax advertisements does not apply to fax broadcasters that *operate like common carriers* by merely transmitting their customers’ messages without determining either content or destination.”³⁷ Accordingly, the only factors which might signify a carrier’s high degree of involvement in a customer’s illegal fax transmissions should be those outlined in the NAL directed to Fax.com – *i.e.*, whether the carrier has stepped out of its traditional role of providing telecommunications

³⁶ See *Central Bank*, 511 U.S. at 177 (Noting that Congress knew how to provide for aiding and abetting liability when it wanted to do so, and reasoning that Congress’s failure to include express aiding and abetting provisions in securities statute reflected a purposeful decision to exclude such liability).

³⁷ Fax.com NAL at 9, ¶ 13 (citations omitted) (emphasis added),

services to develop and provide lists of numbers for use by fax advertisers, or to play a significant part in determining the content of the customer's fax advertising transmissions.³⁸

In addition, the Commission also should specify what constitutes "actual notice of illegal use" sufficient to create an affirmative obligation for carriers to terminate a customer's telecommunications services. Common carriers must not be obligated to take affirmative steps to prevent a customer's transmissions unless the carrier has actual knowledge that the material to be transmitted has been finally adjudicated by a court or other competent, governmental decision-making body to be unlawful and that the sender will continue such transmissions in the future. This standard is consistent with the Commission's construction of common carrier duties under Section 223 and with case law recognizing that carriers cannot be held liable for transmissions of illegal materials when they lack actual knowledge of the contents of future transmissions.³⁹

Even in the obscenity context, the Commission acknowledged that carriers "do not have an obligation affirmatively to determine whether the use of their facilities will be for an unlawful purpose."⁴⁰ It would be contrary to the public interest to place carriers in the "uncertain predicament" of monitoring their customers' operations to assess whether the carriers should "engage the legal machinery" of declaratory judgments to determine the legality of customer communications. Accordingly, for purposes of interpreting whether common carriers are "intentionally involved" in transmitting obscene material, the Commission has stated that it will

³⁸ *Id.*, at 9, ¶ 14.

³⁹ *See Sable Communications*, 1984 U.S. Dist. LEXIS 19524, at *7-8.

⁴⁰ *Obscenity Order*, 2 FCC Rcd at 2820.

“focus upon whether the carrier is passive.”⁴¹ Thus, until a passive carrier has “actual notice that a program has been *adjudicated obscene*,” it has no obligation to restrict the customer’s access to its services under Section 223.⁴² Moreover, at least one federal court has held that “actual notice of illegal conduct” requires *both* a prior adjudication that the conduct is illegal and a basis to know that such conduct will continue in the future. Thus, even if a customer’s past communications have been adjudicated to be obscene, a common carrier typically cannot know the content or destination of any future transmission by that customer and should be permitted to assume that customer will comply with the results of the adjudication. Therefore, the common carrier cannot be held liable for “knowing involvement” in future unlawful transmissions.⁴³ Certainly, if “actual notice” of a customer’s unlawful use of common carrier facilities could ever

⁴¹ *Id.* The Commission’s policy is supported by the legislative history of Section 223: “. . . [N]o common carrier is liable under this provision unless the carrier . . . originates the obscene transmission. As long as a common carrier is following the law and FCC regulations, it could not have knowledge of any transmissions by other parties. Therefore, [carriers] would not be in any way liable for merely transmitting obscene or offensive messages in the capacity of a common carrier.” 129 Cong. Rec. H 10559 (Part II, daily ed., Nov. 18, 1983) (statement of Rep. Bliley).

⁴² *Id.* (emphasis added). Numerous courts have recognized that common carriers generally do not have an obligation, or even the right, to refuse to carry traffic based on allegations of illegality. See, e.g., *Sprint Corp. v. Evans*, 818 F.Supp. 1447, 1457 (M.D. Ala. 1993) (“Currently, under federal law, common carriers do not have an affirmative obligation to investigate whether their facilities are being used by customers for a lawful purpose.”); *Howard v. America Online Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) (“A common carrier does not ‘make individualized decisions. . .’”), *cert. denied*, 531 U.S. 828 (2000); *People v. Brophy*, 120 P.2d 946, 956 (Cal. Ct. App. 1950) (“The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense . . .”).

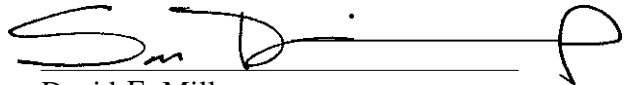
create obligations to restrict service under Section 227, the same actual notice of an “adjudicated” violation required to create common carrier liability under Section 223 should be necessary under Section 227. Complaints, allegations and tentative conclusions cannot suffice. Absent an order requiring a carrier to terminate service, or an adjudication of illegal conduct and knowledge that it will continue, there can be no legal duty for a common carrier to terminate service to a customer under Section 227.

CONCLUSION

Cox respectfully urges the Commission to consider the above recommendations in promulgating any amendments to its rules implementing the TCPA.

Respectfully submitted,

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...continued

⁴³ *Sable Communications*, 1984 U.S. Dist. LEXIS 19524, at *7-8. (“Pacific Bell can do no more than guess at what the content of any future message will be. Absent that knowledge, an accusation of knowing, willful involvement by Pacific Bell cannot fairly be made”).